IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 170 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

and

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

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COMMISSIONER OF INCOME-TAX

Versus

FABRIQUIP PVT LTD

Appearance:

1. INCOME TAX REFERENCE No. 170 of 1988

MR B.B. Naik for Petitioner No. 1

MR B.D. Karia for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH

and

MR.JUSTICE K.A.PUJ

Date of decision: 05/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

The assessee was a wholly owned subsdiary of M/s. Elscope Pvt.Ltd. On 1-3-1977, the assessee had sold its undertaking to M/s. Elscope Pvt.Ltd. under certain terms and conditions mentioned in the agreement entered into between the assessee and M/s. Elscope Pvt.Ltd.

2. In the assessment framed u/s. 143(3) read with Section 144B of the I.T. Act, 1961, the ITO brought to tax Rs.6,82,338/- being interest on deferred sale consideration. Further, he did not allow the assessee's claim for carry forward and set off of unabsorbed depreciation, development rebate and investment allowance of the earlier years on the ground that the assessee had ceased to carry on business during the year under reference. The ITO had also charged interest u/s. 215 of the Act.

In appeal, following his order dated 29-2-1984 in the case of M/s. Sarabhai Chemicals Pvt.Ltd., the CIT (A) held that interest on deferred sale consideration is assessable on accrual basis as per the original agreement. He, further, upheld the action of the ITO rejecting the assessee's claim for carry forward and set-off of unabsorbed depreciation and development rebate and investment allowance as well as charging of interest u/s. 215 of the Act.

Thereafter, the assessee went in appeal before the Tribunal, raising the grievance against the decision of the CIT(A) upholding the action of the ITO in respect of taking interest on deferred sale consideration on accrual basis and disallowances of assessee's claim of unabsorbed, depreciation, development rebate and investment allowance and interest charged u/s. 215 of the Act.

In its order under reference, following its order in the case of M/s. Sarabhai Chemicals Pvt.Ltd., the Tribunal reversed the order of the CIT (A) in respect of deletion of interest on deferred sale consideration and interest charged u/s. 215 of the Act. Further, following the decision of this Court in the case of Deepak Textile Industries Ltd., 168 ITR 773, the Tribunal allowed the assessee's claim for carry forward and set-off of unabsorbed depreciation of earlier years. However, in respect of unabsorbed development rebate and investment allowance, the Tribunal upheld the order of the CIT (A).

3. On the aforesaid facts, the Tribunal has referred

three questions at the instance of the revenue and one question at the instance of the assessee for the opinion of this Court. The questions are as under :-

At the instance of the Revenue :

1. "Whether, on the facts and in the circumstances of the case, the deletion of Rs. 6,82,338 being interest on deferred sale consideration was justified?

2. Whether on the facts and in the circumstances of the case the assessee was entitled to setting off of unabsorbed depreciation ?

3. Whether on the facts and in the circumstances of the case, the assessee was liable to pay interest u/s. 215 of the Act ?"

At the instance of the assessee :

4. "Whether, on the facts and in the circumstances of the case, the assessee was entitled to carry forward and set-off of unabsorbed development rebate and investment allowance ?"

4. As far as the question No.1 is concerned, while deciding the appeal of the assessee, both the appellate authorities have relied on and referred to the decision of the Tribunal in the case of Sarabhai Chemicals Pvt.Ltd. This Court has decided the reference arising out of the order of the Tribunal in the case of Sarabhai Chemicals Pvt.Ltd., (ITA No. 1137/Ahd/84 dated 15.2.85) and confirmed charging of interest on unpaid purchase price so far as the assessment year 1979-80 is concerned. While dealing with the reference of assessment year 1980-81, this Court has observed in Para 16.1 of the Judgment in the case of Sarabhai Chemicals Pvt.Ltd. Vs. ACT (Supra) as under :

16.1. There was no challenge levelled against the resolution dt. 30th June, 1978, on the ground that it was not a genuine resolution. Law permits the contracting parties to lawfully change their stipulations by mutual agreement and, therefore, the assessee and the vendee had no legal impediment in modifying the terms of their contract. The resolution dt. 30th June, 1978, acepted the proposal of the vendee as contained in the letter dt. 15th June, 1978, as is clear from the following words :

"The company hereby approve, accept and adopt the following revised mode of payment as contained in the letter No. Elscope/MC dt. 15th June, 1978, received from Elscope (P) Ltd."

Though the resolution by which it was agreed that the amount of Rs. 1,84,10,253.49 will not carry any interest, and that Rs. 4.70 crores payable in five equal instalment shall carry simple interest at 11 per cent per annum w.e.f. 1st July, 1979, could not be given any retrospective effect so as to facilitate evasion of the tax liability that already had arisen for the asst.yrs. 1979-80, it being a valid stipulation, changed the mode of payment for the date of the resolution and therefore, under the changed mode of payment adopted under it, no interest was to accrue during the accounting period from 1st July, 1978, upto 30th June, 1979, i.e., before 1st July, 1979, as per the new stipulation and therefore, the reasoning of the Tribunal on that count appears to be correct as regards the asst. yrs. 1980-81. Since no interest accrued in the accounting year 1st July 1978 to 30th June, 1979, there could arise no question of relinquishment of interest for any commercial expediency, because, you cannot relinquish income that has not accrued at all. The question Nos. 1 and 2 for the asst.yrs. 1980-81 raised at the instance of the Revenue in IT Ref. No. 56 of 1986 are, therefore, answered accordingly, against the Revenue and in favour of the assessee".

5. On the basis of the above observations made by this Court, Mr. B.B. Naik, ld. Senior Standing Counsel appearing for the Revenue has vehemently argued that here in the present case the resolution changing the date of

payment as well as waiving the interest was passed on 6.2.1979 whereas in the case of Sarabhai Chemicals Pvt.Ltd., the resolution was passed on 30.6.1978. He has further submitted that in the case of Sarabhai Chemicals Pvt.Ltd., the resolution was passed prior to the commencement of the accounting year relevant to assessment year 1980-81, that is from 1-7-1978 to 30-6-1979. In the present case, the resolution was passed on 6.2.1979. In other words, the accounting year relevant to assessment year 1980-81 was already commenced from 1-7-1978 and from 1.7.1978 to 6-2-1979, that is, the date of resolution, the interest was already accrued to the assessee and as per the above observations of this Court, the resolution dated 6-2-1979 could not be given any retrospective effect so as to facilitate evasion of the tax liability that had already arisen for the assessment tax for Assessment year 1980-81. Mr. Naik has submitted that for part of the year the interest was in fact accrued to the assessee and the same is required to be brought to tax. Mr. B.D. Karia, ld. advocate appearing for the assessee has strongly objected to the said contention raised before this Court by Mr. Naik. He has submitted that all the authorities have proceeded on the basis of the decision taken in Sarabhai Chemicals Pvt.Ltd., and since the reference of Sarabhai Chemicals Pvt.Ltd., was decided by this Court in favour of the assessee and against the revenue, no different view should be taken in the case of the assessee. He has further submitted that there is no material or evidence available with this Court to take a different view in the matter.

6. We have heard both the parties at length on the subject. We have also gone through the judgment of this Court and after careful consideration of the submissions made by them as well as the observations made by this Court in Para 16.1 of the Judgment in Sarabhai Chemicals Pvt.Ltd (Supra), we are of the view that there was no adequate material available on record to appreciate the arguments raised by Mr. Naik in their true perspective. As a matter of fact, the authorities below have also not applied their mind from this angle. It is, therefore, in the fitness of things and interest of justice that the matter should be remanded to the Tribunal with a direction that the Tribunal should decide this issue afresh after considering the relevant document and the observations made by this Court in Para 16.1. of the judgment in Sarabhai Chemicals Pvt.Ltd. (Supra). We, therefore, decline to give any answer to this question No. 1 and direct the Tribunal to decide this issue in the light of the aforesaid observations made by this

Court in this matter as well as in the case of Sarabhai Chemicals Pvt.Ltd. (Supra).

7. As far as question No.2 is concerned, our attention is invited to the decision of this Court in CIT vs. Sarabhai Chemicals Pvt.Ltd. (2002) 254 ITR 625 wherein following the decision of the Apex Court in CIT vs. Podar Cement Pvt.Ltd. (1997) 226 ITR 625 and the Full Bench decision of this Court in CIT vs. Mormasji Mancharji Vaid (2001) 250 ITR 542 it is held that the property cannot be owned by two persons, each one having independent and exclusive right over it. For the purposes of Section 22 of the Income-tax Act, 1961, corresponding to Section 9 of the Indian Income-tax Act, 1922, the owner must be "that person who can exercise the rights of the owner, not on behalf of the owner but in his own right." Hence, the liability to pay tax on income from house property is clearly on the person who receives or is entitled to receive the income from property in his own right.

Accordingly, our answer to question No.2 is in the affirmative i.e. in favour of the assessee and against the revenue.

8. Coming to question No.3, our attention is invited to the decision of the Supreme Court in Central Provinces Manganese Ore Co. Ltd. vs. CIT (1986) 160 ITR 961 as applied by this Court in CIT vs. Gordhanbhai Jethabhai (1994) 205 ITR 279 (Guj) and in Sarabhai Chemicals Pvt.Ltd. vs. CIT (2002) 173 CTR 193.

In the aforesaid decisions, this Court has followed the principle laid down by the Apex Court and has accordingly laid down the principle on construction of the provisions of Section 215 of the Act, that interest becomes payable by the assessee under Section 215 as a result of operation of law and it is not made dependent upon the discretion of the ITO. The discretion which is conferred upon the ITO is not in respect of determination of payability of interest but in respect of reduction or waiver of interest payable by the assessee. While deciding whether interest under Section 215 of the Act is payable by the assessee or not, what the ITO has to consider is whether the required conditions are satisfied or not, and at this stage is under no obligation to consider whether interest should be reduced or waived, which question would arise after the aspect of payability of interest is determined. The point of time when the ITO has to decide whether to reduce or waive the

interest would be subsequent. His waiver or reduction of interest presupposes that the liability has been incurred by the assessee.

In view of the aforesaid principle, our answer to question No.3 is in the affirmative i.e. in favour of the revenue and against the assessee.

9. Coming to the last question about carry forward and set off of unabsorbed development rebate and investment allowance, in view of the clear statutory provisions of subsection (5) fo Section 32-A and also subsection (4)(a) and subsection (5) of Section 155 of the Income-tax Act, 1961, as explained by the decision of this Court in Kalindi Investment Pvt.Ltd. vs. CIT (1995) 213 ITR 207 and in view of the fact that the unit was transferred within 8 years from the date of purchase and installation of assets, it has to be held that the assessee was not entitled to carry forward and set-off of unabsorbed development rebate and investment allowance.

Accordingly our answer to question No.4 is in the negative i.e. in favour of the revenue and against the assessee.

10. The Reference accordingly stands disposed of with no order as to costs.

[M.S. Shah, J.]

rmr. [K.A. Puj, J.]